CASE NO. 1054/07

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:-

EAGLE BURGMANN SEALS SA (PTY) LTD Applicant

and

HENRI JACOB CLIGNETT STRYDOM 1st

Respondent

NOVIS EXPANSION JOINTS & MINING SUPPLIES CC 2nd
Respondent

MMABATHO

MONAMA AJ

DATE OF HEARING : 13 SEPTEMBER 2007

DATE OF JUDGMENT : 29 MAY 2008
COUNSEL FOR APPLICANT : ADV O. SALMON
COUNSEL FOR RESPONDENT : ADV P. A. SWANEPOEL

JUDGMENT

MONAMA AJ.

INTRODUCTION – PARTIES.

[1] This is an opposed application which was launched as matter of urgency on 14 June 2007. The applicant is Eagle Burgmann Seals South Africa (Propriety) Limited whose founding affidavit is deposed to by its sales manager, Mr. Thomas Edé Kostyan.

[2] The first respondent is Henri Jacob Clignett Strydom, an adult businessman who resides at 25 Benedon Street, Rustenburg, North West Province. He is the member of the second respondent.

[3] The second respondent is Novis Expansion Joint and Mining Supplies CC which was incorporated during October 2006 and having its principal place of business at 25 Benedon Street, Rustenburg, North West Province.

[4] The first respondent and his wife are the sole members of the second respondent. However, the second respondent withdrew its opposition to these proceedings on 4 July 2007 and did not file any opposing papers. For convenience the first respondent will be henceforth be referred to as “the respondent”.

FACTUAL BACKGROUND.

[5] The applicant’s head office is in Johannesburg but has branches in Port Elizabeth, Cape Town, Bloemfontein, Rustenburg, Richards Bay and Durban. It **manufactures** and sells a wide range of mechanical seals, bellows, expansion joints packing, coupling, gaskets and pumps throughout the Republic of South Africa. It

has operated its business under different names for a period in excess of twenty-five years. [The bolding is mine and for emphasis only]

[6] In addition to the above mentioned activities, the applicant also imports some of its products from its principal company in Germany and some of its established suppliers in the United States of America. Its main customers are in the mining and industrial sectors.

[7] The respondent was employed in September 1997 by the applicant in terms of a written agreement of employment and the restraint of trade agreement. The respondent was initially employed as a foreman for a short period and later was promoted to a position of sales representative in Sasolburg. The restraint of trade agreement was concluded on 11 September 1997.

[8] Clause 2.7 of the restraint thereof provides as follows:

> *"The employee undertakes that he shall not during his employment from the date of termination of his employment for any reason of whatsoever nature with [applicant], directly or indirectly, whether individually or as proprietor . . . employee . . . or otherwise approach or deal with customers of [applicant] by attempting to attract or induce such customers to take their business from [applicant] . . . ."*

[the word applicant refers to "Burgmann" which has since changed its name to "Eagle Burgmam Seals (Pty) Ltd]

In clause 2.8 thereof it is stated as follows:

"the area contemplated in this restraint of trade agreement is the region known as Vaal Triangle."

[9] The said restraint contains an entrenched non-variation clause [clause 7] which provides that:

"No amendment, alteration, variation, deletion, addition or consensual cancellation of this agreement shall be of any force and effect unless reduced to writing and signed by all parties hereto. No agreement purporting to obligate any party to sign a written agreement to amend, alter, vary, delete, add or cancel this agreement shall be of any force and effect unless reduced to writing and signed by all parties hereto."

[10] During 2003 the applicant expanded its business operations and established the branch office in Rustenburg which is in the North West Province. After extensive negotiations between the parties which started in April 2003, the respondent was transferred on 1 September 2003 to Gauteng branch of the applicant as the technical representative and was stationed in Rustenburg.

[11] On 3 October 2003, the respondent accepted his transfer in writing as well as the fact that all the terms and conditions of

employment remain operative. However, he refused to sign a new restraint which was presented to him, already signed on 3 May 2003 by the applicant's duly authorised representative.

[12] On 31 May 2007, the respondent terminated his employment with the applicant. He then devoted his full time to the services of the second respondent who sells and markets, *inter alia*, metal and rubber bellows, fabric expansion joints, gaskets which are extensively used in the mining petro-chemical industries.

[13] The respondent's duties was that of a salesman. He markets and sells on behalf of the second Respondent items used in the mining, petrochemical and industrial sectors. The second respondent is in competition with the applicant insofar as the sales and marketing is concerned. The second respondent does not manufacture the items but merely sells them. It purchases these items from the third parties including the applicant.

ISSUES BETWEEN PARTIES.

[14] The applicant contends that the respondent is in contravention of the provisions of the restraint and employment agreements. As consequence of the said alleged breach, the applicant seeks, as against the respondent an order interdicting and restraining him, in whatever capacity, from approaching or dealing with some of its customers who are listed in annexure "A" to the notice of motion. It is noteworthy that the applicant seeks only limited interdict and no plausible explanation was forthcoming for such

"benevolent" request.

[15] The further relief sought by the applicant is an order prohibiting the respondent from:

> *"Attempting to attract or induce such customers [as listed in annexure "A" to then notice of motion] to take away their business from the applicant . . . "*

The relief sought is limited as to the customers whom the respondent must not either directly or indirectly approach. From the papers it is safe to draw an inescapable inference that the respondent was the only member of the applicant who actively expanded and grew the business of the Applicant in Rustenburg.

[16] Accordingly, the real dispute between the parties for determination by this Court is whether the restraint of 11 September 1997 should be tacitly relocated to Rustenburg.

[17] The applicant argued that this agreement should be held to have been tacitly relocated to Rustenburg when the respondent was deployed because it was the term and condition of his employment.

[18] The respondent's defence is that the restraint covers the limited geographical operation, namely Vaal Triangle and accordingly can not be varied to include any other area without complying with the mechanism stipulated in the non-variation clause. Mr

Swanepoel on behalf of the respondent did not even argue the elements necessary to sustain the relocation as propounded by the courts.

[19] The clauses which are subject of this application are enumerated in clause 2 which deals with the restraint provide as the following:

"*2.1 The employee acknowledges that by virtue of his association with Burgmann, he is possessed of and has complete access to the accumulation of trade secrets and confidential information including, inter alia, and without limiting the generality of the aforegoing the following matters, all of which are hereinafter referred as "Burgmann's proprietary's interests"*:

2.1.1 all internal control systems including head office accounting, factory administration and buying administration;

2.1.2 customer connection details, related information and the like;

2.1.3 financial details of Burgmann's relationship with its suppliers including discount structures and knowledge of individual discounts;

2.1.4 knowledge of and influence over Burgmann's customers;

2.1.5 details of Burgmann's financial structure and operating results;

2.1.6 buying policies and strategies;

2.1.7 methods of warehousing, manufacturing and systems of control and security therefore;

2.1.8 salary and wages policy;

2.1.9 financial details of Burgmann's relationship with its customers and clientele;

2.1.10 direct access to customer lists of Burgmann;

2.1.11 other matters which relate to the business of Burgmann in respect of which information is not readily available in the ordinary course of business to a competitor of Burgmann.

2.2 During the course of his association with Burgmann, the employee has and will continue to have a sound and close business relationship with its' customers.

2.3 By virtue of his association with Burgmann he will become possessed of and will have complete access to the accumulation of trade secrets and confidential information

of Burgman.

2.4 The employee will be permitted to develop and maintain close personal contact with Burgmann's clientele and will have free access to Burgmann's financial and marketing policies within the scope of his employment, its clientele lists, its special arrangements with its clientele and generally its methods of carrying on its business.

2.5 On the expiration or termination for any reason of whatsoever nature of the employee's services or association with Burgmann, if he were to join any competitor of Burgmann or if he were to conduct business for his own account, the benefit of Burgmann's trade secrets and its clientele lists will inevitably become available to the competitor and the employee and enable it to compete unfairly with Burgmann and cause it great prejudice.

2.6 The only effective, reasonable manner in which the proprietary rights of Burgmann and its trade secrets are protected and secured are the undermentioned restraints imposed upon the employee, which restraints are fair and reasonable, both as to duration and area.

2.7 The employee undertakes that he shall not, during his employment by Burgmann and for a period of 18 (eighteen) months commencing from the date of

termination of his employment for any reason of whatsoever nature with Burgmann, directly or indirectly, whether individually or as proprietor, partner, director, shareholder, representative, employee, consultant, adviser, contractor, financier, agent, assistant or otherwise, approach or deal with customers of Burgmann by attempting to attract or induce such customers to take their business from Burgmann and place such business, either directly or indirectly, with the employee insofar as such business relates to the business carried on by Burgmann.

2.8 The area contemplated in this restraint of trade agreement is the region known as Vaal Triangle."

As it will later become obvious both parties did not submit any argument about the scope of the restraint, and the reasonableness thereof and confidentiality. This Court was not requested to make any pronouncement in this regard. The argument for both parties were limited to tacit relocation and the **shifren** principle.

DISCUSSIONS – AGREEMENTS IN RESTRAINT OF TRADE, THE SHIFREN PRINCIPLE AND TACIT RELOCATION OF CONTRACT.

[20] The following facts are common cause namely:

- The existence of a valid restraint of trade agreement dated

11 September 1997;

- That the respondent did not sign the new restraint of trade agreement which the applicant signed on 2 May 2003;
- That the respondent did not sign the so called “amended conditions of employment” dated 1 April 2003;
- That the second respondent is in competition with the applicant.

According to the legal system the principle of contractual freedom is well settled. Therefore the parties are at liberty to define the contents of contractual terms they wish to be included in a restraint. However, the contractual terms should not be unreasonable and against public policy. Even where the agreement is reasonable , the Court is not precluded to investigate the reasonableness or otherwise thereof.

AGREEMENTS IN RESTRAINT OF TRADE.

[21] As a general rule agreements in restraint are valid and enforceable unless they impose unreasonable restrictions and are against public policy as held in various decisions since the advent of **Magna Alloys and Research (Pty) Ltd vs Ellis 1984(4) SA 874(A)**. The party who seeks to escape the enforcement of the restraint must prove on a balance of probability that, in all the circumstances of the particular case, it will be unreasonable to enforce the restraint. However, before the restraint can be enforced, the existence of protectable proprietary interests must be established by the party seeking the enforcement of the

restraint.

[22] The principles of the restraint are well settled and its jurisprudence is well documented. The doctrine of the restraint of the trade raises interesting and yet complex issues, such as the freedom of trade, occupation and profession which enjoy the constitutional protection as held in **Canon KZN (Pty) Ltd t/a Canon Office Automation vs Booth 2005 (3) SA 205 (NPD)** @ 209 G-J where it was held that

> "Insofar as restraint is a limitation of the right of freedom of trade, occupation and profession, entrenched in s 22 of the constitution, the common law as developed by the court complies with the requirements laid down in s 36(1) of the constitution as to the limitation of such a right. The common law in regard to restraints are only enforceable if they are not in conflict with public policy. A restraint would be adverse to public policy if its enforcement would be contrary to the public interest. It would most likely be contrary to the public interest if it is unreasonable. It would be unreasonable if and to the extent that it does not seek to protect a legitimate interest of the party; or if it does purport to protect a legitimate interest of the one party; or if it does purport to protect an interest, such interest is eclipsed by the interest of the other party not to be so restrained". (See also **Advtech Resources t/a Communicate Personnel Group vs Kuhn 2008 (2) SA 375 (CPD)** @ 384 A-D) and **Minister of Home Affairs and Another vs Watchenuka and Another 2004 (4) SA 326 (SCA)** @ 329 F-G.

The case between the parties is based on contract as constituted by the letter of 9 September 1997, the written contract of employment of 11 September 1997, the restraint of trade agreement signed by the applicant and respondent on 10

September 1997 and 11 September 1997.

[23] The parties did not offer any argument regarding the public policy issues and freedom to trade or to practise a profession. These are issues which have attracted various judicial pronouncement and the development of substantial jurisprudence. The restraint of 11 September 1997 is the exact copy of the restraint which the respondent refused to sign. The said copy of the second restraint provides in clause 2.8 thereof that:

> *"the area contemplated in this restraint of trade agreement is the region known as Free State, Gauteng, Northern Province"*

This was an attempt to bind the respondent in other areas. Had the respondent signed it, the current dispute would still be there because "Rustenburg" is in the North West Province which was excluded.

[24] Very little is said about the background of the respondent and his duties as the so-called technical representatives are not delineated. A restraint agreement is also affected by constitutional rights. As stated above the parties did not argue the scope or the reasonableness thereof. These are critical factors. Accordingly the court cannot express any view in this regard. In **Reddy vs Simmens Telecommunications (Pty) Ltd 2007 (2) 486 (SCA)** @ 495 E-F the Court left open the question of onus in restraint of trade.

[25] In determining the reasonableness of a restraint, public policy and

contractual autonomy, the court makes a value judgment and the enquiry covers a wide field including the following:

> *"the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests"* as held in **Reddy vs Simmons Telecommunications (Pty) Ltd 2007 (2) 486 (SCA)** @ 497 F. (See above **Basson vs Chilwan and Others 1993 (3) SA 742(A)** @ 767 G-H.

These factors are critical and the parties have regrettably not been able to assist the Court in this regard.

[26] The other consideration is that the respondent appears to have been the sole member of the applicant who was actively in building the clientele for the business in Rustenburg with occasional of limited assistance. It is not in contestation that the respondent acquired certain undefined skills at the expenses of the applicant. The respondent restored to the applicant its minimal assets which he used whilst in their employ.

[27] Can it be fair and reasonable to consider the respondent's knowledge of the clientele to be the asset of the applicant? In my view, it will be inappropriate to consider the skill and abilities to be the protectable interests of the applicant. In **Basson** *supra* the court held that:

> "…it has often been said in the authorities that a man's skills and abilities are part of himself and that he cannot ordinarily be precluded from making use of them by a contract

in restraint of trade." @ 778 D.

The same observation were made in **Sibex Engineering services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (TPD)** where the court held that an employee does not afford an employer to acquire in him the **"**proprietary interest" or in his knowledge or skills" . See 507 E-F.

[28] There is no valid reason for the respondent not to utilise skills and knowledge acquired by virtue of his employment except where restricted by a contract. In the present case there is no such contractual restriction. See **Reeves & Another vs Marfield Insurance Brokers CC and Another 1996 (3) SA 766 (A)** @772 D-F. The respondent is contractually precluded only in the geographical of Vaal Triangle and not Rustenburg.

TACIT RELOCATION OF CONTRACT.

[29] The validity and reasonableness of the restraint concluded between the parties on 11 September 1997 is common cause. It was not challenged on the grounds of public policy. However, the applicant contents that the restraint of trade agreement relating to the Vaal Triangle should be held to have been tacitly relocated to the new area, namely Rustenburg. In support of such suggested approach Mr. Salmon on behalf of the applicant relied on the decision of **Golden Fried Chicken (Pty) Ltd vs Sirad Fast Food CC and Others 2002(1) SA 822 (SCA)** where it was held that:

> " *A tacit relocation is construed when the parties to a lease, after its termination, so conduct themselves that their conduct gives rise to an inference that both of them desire the* ***revival*** *of the landlord and tenant relationship on the same terms that existed before" @ 825 D-E****.***

The tacit relocation applies primarily to the expired lease agreements.

[30] In the **Golden Fried Chicken**, the Supreme Court of Appeal extended the tacit relocation to the franchise contract. This decision must be approached with caution and should not be applied willy-nilly. In that case the court did not, *per se*, deal with the restraint clause. Before a contract can be tacitly relocated, a certain critical condition must exist. The contract intended for tacit relocation must have expired. In **Fiat SA vs Kolbe Motors 1975 (2) SA 129 (O)** the court clearly stipulated that:

> " *'n Huurkontrak kan ongetwyfeld stilswyend hernu word, maar so 'n "hernuwing" is egter in werklikheid 'n nuwe kontrak...."*

(See also **Shell South Africa v Bezuidenhout and Others 1978 (3)**
SA 98 1 @ NPD @ 984 C-D)

These decisions were approved in the decision of **Golden Fried Chicken** *Supra*.

[31] The applicant raised the defence of tacit relocation but failed to address the court why it had to so relocate the restraint in the light of the above authorities, save to say the relocation will make economic sense on the authority. The revival must relate to an old expired agreement condictio *sine qua non.* In **Siemmens** decision *supra*, the court left open the question of onus in matters involving a restraint. The defence in relocation of contract does not deal with the restraint and the Court is of the view that the applicant bears the onus to prove tacit relocation.

[32] The respondent assumed his employment in the Rustenburg area in terms of the existing contract of employment entered into in 1997. The letter of 22 September 2003 addressed to the respondent which is headed "up-dated amendment to your conditions of employment" cannot be construed as a new agreement. Nowhere in this document can it be reasonably inferred that the parties intended to revive a terminated contract of employment. They merely stated the salary to be payable. The letters of 1 April 2003 and 22 September 2003 indicated that the respondent has accepted to be transferred and nothing more. Accordingly the tacit relocation is inapplicable in the circumstance of this case. This conclusion is buttressed by the correspondence from the applicant and fact that the respondent refused to execute a new agreement in restraint of trade which was presented to him by the officials of the applicant.

THE SHIIFREN PRINCIPLE.

[33] The **Shifren** principle established by the Appellate Division of the Supreme Court in the famous case of **SA Ko-op Graanmaatskappy BPK v Shifren en Andere 1964 SA** 760 (A). The principle is still applicable, notwithstanding various unsuccessful attempts to overturn it. In **Brisley v Drosky 2002 (4) SA 1 SCA** @ 26 D-F it was held that:

> "Om nou die shifren beginsel in sy geheel te begrave, kan kommersiële chaos skep, 'n vraagteken plaas agter talle bestaande kontrakte en, les bes, kontraproduktief wees ten aansien van belegging en ondernemings wat op die lange duur almal se belange kan bevorder, soos die oprigting en verhuur van wooneenhede. As die risiko van geskille en hofsake, wat weens beweerde mondelinge ooreenkomste kan onstaan, nie effektief uitgeskakel kan word nie, sal verstandige sakelui en selfs private deelnemers aan die handelsverkeer hulle óf van ondernemings en beleggings weerhou óf hul toevlig neem tot ander, minder gewenste, beskermingsmootlikhede. Daar is dus veel te sê vir die behoud van die ***shifren****-beginsel".*

[34] The letters of 1 April 2003 and 22 September 2003, cannot by stretch of any imagination held to be compliance with the mechanism of the entrenched non-variation clause.

[35] The respondent disputes the existence of a restraint agreement relating to his employment with the applicant in Rustenburg area. The respondent relies on the entrended non-variation clause and submitted, rightly so in my view, that before the applicant can succeed in its defence [of tacit relocation] it must establish that:

> ***"****Alvorens die beskermingswaardige belange wat applikant*

wil beskerm in die aangevraagde regshulp enigsins beskerming kan geniet volg dit noodwendig,..... , dat daar 'n geldige en afdwingbare handelsbeperkingsooreenkoms moet bestaan, tussen applikant en eerste respondent, ingevolge waarvan applikant kan aanspraak maak of die verlangde regshulp."

[36] Counsel for parties argued that the correct approach that this court should follow is "pacta sunt servanda". In addition to the suggested approach the applicant argued that the restraint deserves a "meaningful" construction, that "must make commercial" sense. It was submitted that the rationale thereof is to protect a proprietary interest. Mr. Salmon submitted, on behalf of the applicant that it made business sense to extend a restaint in respect of the Vaal Triangle to Rustenburg. In his submission the extension will make sense. On the other hand Mr. Swanepoel submitted on behalf of the respondent that the non-variation clause should be respected and relied on the **Shifren** principle.

[37] The Court established the existence of a valid restraint of trade agreement between the parties which, applies to a limited geographical area. As stated above the said restraint agreement cannot be relocated to any other area without amendment of the non-variation. An attempt by the applicant to execute a further restraint, would not have disposed of the current dispute as explained in paragraph 23 *Supra*.

[38] Counsel for the applicant did not argue the **Shifren** principle of

entrenched non-variation clause. In the light of the **Brisley** decision, the attitude of Counsel was well taken. What was strongly argued on behalf of the applicant is that the restrained agreement deserves a "meaningful construction" that "must make commercial sense". The argument is attractive but does not assist the applicant. In fact such factors have slow being rejected. In **Brisley**, the Supreme Court of Appeal rejected the *bona fide* argument as propounded in **Miller and Another NNO vs Dannecker 2001 (1) SA 928 (CPD)** and held that:

> "Die Miller-saak bied wel steun vir die huurder se betoog dat die hof kan weier om die beroep op 'n verskansingsklousule te handhaaf indien dit up 'n verbreking van die goeie trou-beginsel sou neerkom. *Na ons mening kan hierdie beslissing egter nie as korrek aanvaar word nie."* [See P13 @ A] [The underline mine]

The argument about meaningful construction and commercial sense are attractive but cannot be utilised to overrule the principle. Accordingly the applicant's defence must fail.

[39] As stated in paragraph 22, the doctrine of the restraint raises interesting and yet complex issues. The dignity to work has enjoyed various juridicial scrutiny in the light of the Constitution. See in this regard the decision of **Affordable Medicine Trust and Others vs Minister of Health and Others 2006 (3) SA 247 (CC)** @ 274 H – 275 C where it was held that:

> *"One's work is part of one's identity and is constitutive of one's dignity. .....Limitations on the right to freely choose*

a profession are not to be lightly tolerated. But we live in a modern and industrial world of human interdependence and mutual responsibility. Indeed we are caught in an inescapable network of mutuality."

The case between the parties is based on contract as constituted by the letter of 9 September 1997, the written contract of employment of 11 September 1997, the restraint of trade agreement signed by the applicant and respondent on 10 September 1997 and 11 September 1997.

[40] Mr. Salmon referred during his argument to the decisions of **Petre & Madco (Pty) Ltd t/a T-chem vs. Sanderson-Kasner & others @ 1984 (3) 850 (WLD)**, **National Chemsearch (SA) (Pty) Ltd vs Borrowman and Another 1979 (3) SA 1092 (TPD)** and **IIR South Africa BV vs Hall (aka Baghas) 2004(4) SA 174 (WLD)**. The decisions deal with the power of the Courts to curtail the ambit of the restraint to make it reasonable. The decisions do not assist the applicant.

ORDER

In the result, the applicant has not shown on the papers that it is entitled to the relief it seeks. Accordingly the application is dismissed with costs.

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R E MONAMA

Acting Judge of the High Court